STATE OF MICHIGAN

COURT OF APPEALS

KATRINA HATCHETT, Guardian and Conservator of JACQUELINE WRIGHT, a legally incapacitated person, and KATRINA HATCHETT, Individually,

Plaintiff-Appellant/Cross Appellee,

v

PURNA SURAPANENI, M.D.,

Defendant-Appellee/Cross Appellant,

and

BOARD OF MANAGERS FOR CITY OF FLINT, d/b/a HURLEY MEDICAL CENTER, GENESYS AMBULATORY HEALTH SERVICE, INC., HILLSIDE CENTER FOR BEHAVIORAL SERVICE, GENESEE PSYCHIATRIC ADMINISTRATIVE CENTER, G P A, and ACCESS TO BEHAVIORAL HEALTH SERVICES,

Defendants-Appellees.

UNPUBLISHED
November 6, 2003

No. 238714
Genesee Circuit Court
LC No. 99-065219-NH

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's (1) order granting defendants' motion in limine to limit the testimony of plaintiff's expert Dr. Richard Ries, (2) orders granting summary disposition in favor of Hurley Medical Center and Purna Surapaneni, M.D., and (3) order denying plaintiff's motion in limine to strike defense expert Dr. Robert Weiss. Defendant Dr. Surapaneni cross appeals the order granting plaintiff's motion to amend her witness list. We affirm in part and reverse in part.

On October 25, 1996, Jacqueline Wright was admitted to Hurley Medical Center under the care of defendant Dr. Surapaneni, a psychiatrist. Wright was intoxicated and had a blood

alcohol level of 411 mg/dl. The next day Wright was found unresponsive and without a blood pressure or pulse. Resuscitation efforts were successful, but Wright remained in a persistent vegetative state until her death a few years later. Plaintiff brought this action alleging that defendants' failure to properly treat Wright for acute alcohol intoxication, including alcohol withdrawal, caused Wright to suffer debilitating injuries, including cardiac arrest, anoxic encephalopathy, and related injuries. Dr. Richard Ries, a psychiatrist, signed the affidavit of merit attached to the complaint. Following defendants' first motion for summary disposition, all institutional defendants except Hurley Medical Center were dismissed on the ground that Dr. Surapaneni was not their agent at the time care was rendered to Wright. That decision is not appealed.

Thereafter, defendants Dr. Surapaneni and Hurley Medical Center filed a motion in limine to prohibit plaintiff's psychiatric expert, Dr. Ries, from offering testimony on the issue of causation related to Wright's cardiac arrest, alleging that such testimony was not admissible under MRE 702. Plaintiff responded, arguing that Dr. Ries was an expert in alcohol withdrawal syndrome, including its potential complications like cardiac arrest, and thus was permitted to render his opinion on the issue of causation. Plaintiff then moved to amend her witness list to add a cardiologist as an expert witness, to which defendants objected as untimely and prejudicial. Plaintiff also filed a motion in limine to strike defendant Dr. Surapaneni's standard of care expert, Dr. Roger Weiss, arguing that he did not meet the "active clinical practice" requirement of MCL 600.2169.

After hearing oral arguments on the motions, the trial court granted defendants' motion in limine, holding that Dr. Ries was not qualified to testify as to whether Wright's cardiac arrest was caused by the failure to treat her alcohol withdrawal syndrome or a preexisting cardiac condition. The trial court granted plaintiff's motion to amend her witness list to add a cardiologist, Dr. Arthur Simon, holding that the defense would not be prejudiced. The court denied plaintiff's motion to strike defense expert Dr. Weiss, holding that he was qualified under MCL 600.2169. After defendants deposed plaintiff's expert in cardiology, they moved for summary dismissal, arguing that plaintiff could not establish causation since Dr. Simon testified that he was not an expert in alcohol withdrawal syndrome and admitted that Wright's underlying cardiac problems contributed to her suffering a cardiac arrest. The trial court agreed, holding that plaintiff could not demonstrate that anything defendant "Dr. Surapaneni did or did not do caused or contributed to" Wright's cardiac arrest and associated injuries. An order of dismissal was entered and this appeal followed.

First, plaintiff argues that the trial court abused its discretion in prohibiting Dr. Ries from testifying on the issue of causation because he was qualified under MCL 600.2169 and permitted under MRE 702 to render such opinion. We agree. The qualification of a witness as an expert, and the admissibility of such testimony as evidence, are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Mulholland v DEC Int'l Corp*, 432 Mich 395, 402; 443 NW2d 340 (1989). Similarly, a trial court's decision to grant or deny a motion in limine is reviewed for an abuse of discretion. *Kochoian v Allstate Ins Co*, 168 Mich App 1, 12; 423 NW2d 913 (1988).

MCL 600.2912a provides:

> (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:
>
> * * *
>
> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Expert testimony is required to articulate "the recognized standard of practice or care" and, axiomatically, to opine whether the defendant failed to provide that standard of practice or care. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 216; 642 NW2d 346 (2002). MCL 600.2169, however, imposes strict requirements regarding experts and provides, in pertinent part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony **on the appropriate standard of practice or care** unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty. [Emphasis added.]

Here, it is undisputed that plaintiff's proposed expert, Dr. Ries, a psychiatrist, was qualified under MCL 600.2169 to render testimony "on the appropriate standard of practice or care" in this case against defendant Dr. Surapaneni, a psychiatrist. However, the trial court prohibited Dr. Ries from testifying as to the causation element of the case apparently on the ground asserted by defendant in his motion in limine – that the proposed testimony would not meet the admissibility requirements of MRE 702. See *Tate*, *supra* at 217.

MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Accordingly, expert testimony is admissible under MRE 702 if (1) the witness is qualified as an expert in a pertinent field, (2) the testimony is relevant in that it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue," and (3) the testimony is derived from

"recognized scientific, technical, or other specialized knowledge . . . ." *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990). Here, Dr. Ries (1) was qualified as an expert in alcohol withdrawal syndrome, a pertinent field, (2) the testimony was offered to assist the trier of fact in understanding the nature and risks of this alcohol-related disorder and to prove that Wright's untreated or improperly treated alcohol withdrawal caused her to suffer from this syndrome which resulted in Wright experiencing a well-known risk of the syndrome, a cardiac event, and (3) the testimony was about a medical condition and, thus, derived from specialized knowledge.

Defendants appear to contend that only a specialist in the area of the alleged injury is permitted to testify as to its precise nature. Here, for example, a cardiologist or internal medicine specialist would be the only experts permitted to testify regarding Wright's cardiac arrest. Defendants have failed to support that assertion with apposite legal authority and the argument is contrary to common and reasonable practice. It is common practice in personal injury actions for physicians to testify about a plaintiff's resulting injuries although they are not specialists in the involved area of medicine. For example, a plaintiff who was involved in a motor vehicle accident is permitted to have his family physician testify that the plaintiff's arm was fractured in the car accident – an orthopedic physician is not *required* to testify, although an orthopedic may be more qualified. The defendant can attempt to rebut the plaintiff's evidence through testimony of an orthopedic physician who testifies that, because of a preexisting brittle bone condition, the plaintiff's fracture existed before the car accident even occurred. That same plaintiff's family physician may testify that the car accident caused the plaintiff to suffer from high blood pressure and a fear of driving. The defendant could rebut that evidence through the testimony of a cardiologist and psychiatrist who opine that the conditions resulted from genetics, a bad marriage, and a recent death in the family. In sum, as long as the requirements of MCL 600.2169 and MRE 702 are met, a plaintiff may attempt to prove his claim through the experts that he deems sufficient. "Gaps or weaknesses in the witness' expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility." *Wischmeyer v Schanz*, 449 Mich 469, 480; 536 NW2d 760 (1995), quoting *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987).

In conclusion, plaintiff's psychiatric expert, Dr. Ries was permitted to testify that defendant Dr. Surapaneni, a psychiatrist, failed to provide the recognized standard of practice or care under the circumstances with regard to Wright's alcohol withdrawal and, as a proximate result of that breach, Wright suffered from alcohol withdrawal syndrome which led to her experiencing a cardiac arrest and associated injuries. Defendants may rebut that evidence with testimony from their own experts that Wright did not suffer from alcohol withdrawal syndrome or that Wright's cardiac arrest was caused by her preexisting condition but that does not impact plaintiff's right to present her case. Consistent with the longstanding principle that causation is generally an issue for the trier of fact, *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002), it is for the jury to decide which of the experts' testimony is more persuasive. Accordingly, the trial court abused its discretion in prohibiting Dr. Ries from rendering expert testimony on the issue of causation and that decision is reversed. In light of the trial court's impermissible exclusion of Dr. Ries' testimony on the issue of causation, we need not consider plaintiff's claim that summary disposition was improperly granted for failure to establish "cause in fact" causation. The grant of summary disposition is reversed.

Finally, plaintiff argues that the trial court abused its discretion by denying her motion in limine and permitting defense witness Dr. Weiss to testify as an expert because he was not qualified under MCL 600.2169. We disagree.

MCL 600.2169 requires that the proposed expert witness devote a majority of time to active clinical practice. Dr. Weiss testified that about 50 percent of his professional time was spent performing research – but it was clinical research, i.e., had a significant clinical component, including patient care and treatment. As director of the treatment program at the hospital, Dr. Weiss also spent about 20 percent of his time on the in-patient unit reviewing and discussing clinical treatment cases, and devoted about 30 percent of his time to seeing his own clients. It appears that Dr. Weiss was engaged in the active clinical practice of psychiatry in most if not all facets of his professional time; therefore, the trial court did not abuse its discretion when it denied plaintiff's motion in limine.

On cross appeal, defendant Dr. Surapaneni argues that the trial court abused its discretion in permitting plaintiff to file an amended witness list to add a cardiologist because it was untimely and unsupported by good cause. We disagree. We review a trial court's decision to allow a party to amend a witness list to add an expert witness for an abuse of discretion. *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

Here, after the trial court granted defendants' motion to prohibit Dr. Ries, plaintiff's only causation expert, from testifying on the issue of causation, it granted plaintiff's motion to amend her witness list to add a cardiologist. If the trial court had denied plaintiff's motion, the effect would have been dismissal of plaintiff's case for failing to timely file a witness list. A dismissal grounded on the failure to comply with a discovery order is a sanction that requires careful consideration of all the facts and circumstances of the case and should only be imposed for the most egregious violations of the court rules. See *Schell v Baker Furniture Co*, 232 Mich App 470, 477; 591 NW2d 349 (1998); *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). Factors that should be considered, at least, include "(1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to defendant; (4) actual notice to the defendant of the witness and the length of time prior to trial that the defendant received such actual notice; (5) whether there exists a history of plaintiff engaging in deliberate delay; (6) the degree of compliance by the plaintiff with other provisions of the court's order; (7) an attempt by the plaintiff to timely cure the defect, and (8) whether a lesser sanction would better serve the interests of justice." *Id*.

In this case, plaintiff only requested to add another expert witness after defendants' filed their motion contesting the qualifications of Dr. Ries with regard to testimony on the issue of causation. Plaintiff legitimately and correctly assumed that Dr. Ries was qualified to render the contested testimony. Therefore, plaintiff's delay in naming a cardiologist as an expert witness was not willful or accidental. Further, the record fails to reveal any history of discovery abuses or dilatory behavior by the plaintiff and any prejudice to defendants by the addition of this witness was negligible, as determined by the trial court. In fact, defendants did depose plaintiff's additional expert without delay which permitted them to file a second motion for summary disposition shortly thereafter. In sum, the sanction of dismissal would have been disproportionate to any ramifications associated with the delay in plaintiff naming Dr. Simon, a cardiologist, as an expert witness. See *Colovos v Dep't of Transportation*, 205 Mich App 524,

528; 517 NW2d 803 (1994). Accordingly, the trial court did not abuse its discretion in granting plaintiff's motion to amend her witness list.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad